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82-1752
No.

In the Supreme Court of the United States

October Term, 1982

John F. Desris and Leo F. Konrad,
Petitioners,

v.

The City of Kenosha, Wisconsin, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

J. BRUCE CROSS
(Counsel of Record)

STEPHEN W. JONES
KATHRYN D. HOLT
HOUSE, JEWELL, DILLON,
DOVER & DIXON, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Petitioners

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS VIOLATED RULE 52(a) OF THE FEDERAL RULES OF CIVIL PROCEDURE IN REVERSING THE TRIAL COURT'S DECISION.

2. WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT WHETHER TWO GROUPS ARE SIMILARLY SITUATED IS A THRESHOLD QUESTION, THAT WHEN RESOLVED IN THE NEGATIVE, OBVIATES THE NEED TO DETERMINE IF THERE IS A RATIONAL BASIS FOR DIFFERENT TREATMENT.

3. WHETHER THE COURT OF APPEALS SOUGHT TO AVOID THE APPLICATION OF THIS COURT'S DECISION IN *OWEN V. CITY OF INDEPENDENCE*, 455 U.S. 622 (1980) BY APPLYING AN IMPERMISSIBLE STANDARD OF APPELLATE REVIEW AND BY UTILIZING AN ERRONEOUS FRAGMENTATION OF THE RATIONAL BASIS TEST.

PARTIES INVOLVED

The parties involved in this petition are: John F. Desris and Leo F. Konrad, Petitioners; and the City of Kenosha, Wisconsin, Casimir J. Miechowica, Elmer J. Rogan, Robert V. Baker, William S. Pocan, Donald Andreoli, Peter P. Nedweski, George R. Fitchett, Earle G. Scoville, Jesse Kolmos, Frank J. Bennett, John D. Bilotti, John J. Madison, Jr., Donald S. Lambrecht, Michael Baltes, Albert Frank, Alvin G. Hoffman, Gerald F. Bellow, Paul W. Saftig, Peter J. Ziehen, Alfred W. Andreucci, William H. Birkholz, Robert C. Boettcher, Ronald E. Broesch, Ronald L. Johnson, Stephen M. Judella, Michael J. Stancato, Members of the Common Council of the City of Kenosha, Wisconsin; and Wallace E. Burkee, Mayor of the City of Kenosha, Wisconsin, Respondents.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Petitioners, John F. Desris and Leo F. Konrad, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding September 9, 1982, and the rehearing of such, which was denied on January 26, 1983.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 687 F.2d 1117. It is set forth in Appendix A.

The Judgment of the Court of Appeals appears as Appendix B.

The Denial of Rehearing appears as Appendix C.

The Opinion of the District Court entered on January 7, 1982, it appears as Appendix D.

The Partial Stipulation of Facts appears as Appendix E.

The Order of the District Court entered on April 1, 1980 appears as Appendix F.

The Statutes, rules and ordinances involved appear as Appendix G.

Excerpts from Plaintiffs' Brief in Support of Motion for Summary Judgment on equal protection claims arising under fourteenth amendment and 42 U.S.C. §1983 appear as Appendix H.

JURISDICTION

The judgment of a Panel of the Court of Appeals for the Seventh Circuit was denied and entered on September 9, 1982. The petition for rehearing was denied on January 26, 1983. This Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES, RULES AND ORDINANCES INVOLVED

Fed. R. Civ. P. 52(a):

> In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for

> purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. The findings of a master, to the extent that the court adopts them, shall be considered as the findings of the court. If an opinion or memorandum of decision is filed, it will be sufficient if the findings of fact and conclusions of law appear therein. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

Relevant portions of WIS. STAT. §62.13 (1975) are set forth in Appendix G.

Relevant portions of WIS. STAT. §§41.02 & 41.11 are set forth in Appendix G.

Kenosha, Wisconsin, Ordinance No. 19 (July 2, 1956) appears in Appendix G.

Kenosha, Wisconsin, Ordinance No. 39-74 (May 7, 1974) appears in Appendix G.

Kenosha Fireman's Pension Board, Resolutions dated May 26, 1967 and May 21, 1974 appear in Appendix G.

STATEMENT OF THE CASE

The City of Kenosha, Wisconsin has two pension plans for its firefighters, one covering those firefighters hired before January 1, 1948 and the other covering those hired after that date. The former plan was established pursuant to Wis. Stat. §62.13 (hereinafter "62.13 Plan"), now superseded by §41.60, which mandated that all cities of certain classes, including the City of Kenosha, create a pension fund and that said fund be administered by a city board (the Kenosha Fireman's Pension Board, hereinafter "KFPB") whose members would be the Mayor, Fire Chief, City Clerk, City Comptroller and three firefighters.

In 1947, the Wisconsin Legislature enacted Wis. Stat. §66.90, later codified as Wis. Stat., Chapter 41, and now as Chapter 40, creating a new pension plan, the Wisconsin Retirement Fund (hereinafter "WRF"), and required that all municipal employees participate in this plan. The creation of the WRF, however, did not eliminate the 62.13 Plan. The members of the 62.13 Plan were given the option of joining the WRF or of continuing under the 62.13 Plan (1947 Wis. Stat. §66.901(5)(b)). No firefighter in Kenosha elected to join the WRF and, instead, all elected to retain their coverage under the 62.13 Plan.

While there was initially no mandatory retirement age under the 62.13 Plan, the WRF mandated retirement for all members at age 65 (1947 Wis. Stat. §66.906) unless the municipality elected to exercise its option to extend employment beyond that date. Therefore, when Petitioners John Desris and Leo Konrad were hired on January 15, 1951 at the respective ages of 35 and 34, their pension benefits were provided by the WRF which provided that they could work until age 65.

On July 2, 1956, the Respondent City elected to exercise its option to establish its own mandatory retirement age for WRF employees. On that date, the

Common Council (hereinafter "Council") passed Ordinance No. 19 (1956) which adopted age 65 as the compulsory retirement age for WRF employees. Later, the Wisconsin Legislature set age 60 and, ultimately, age 55 as the "normal" and compulsory retirement age under the WRF for those in the protective occupations (which included firefighters). (1956 Wis. Laws, Chapter 549 (age 60); 1959 Wis. Laws, Chapter 251 (implementation of age 60 delayed until January 1, 1964); 1963 Wis. Laws, Chapter 303 (implementation of age 60 delayed until January 1, 1966); 1967 Wis. Laws, Chapter 355 (set age 55 as compulsory retirement age for protectives effective June 30, 1974 but effective as "normal" retirement age on June 30, 1969)). However, these subsequent changes in Wis. Stat. §66.90 (now codified as Wis. Stat. Chapter 40) were effective only if a municipality did not exercise its option to extend the retirement age. By setting its own retirement age of 65 for WRF employees, the Respondent City *did* exercise its option and, therefore, statutory amendments to §66.90 had no effect on the firemen employed by the City of Kenosha.

Unlike the WRF, the 62.13 Plan initially had no mandatory retirement age. This was true until May 26, 1967 when the KFPB, upon finding that it was desirable to have a consistent retirement age for all firefighters employed by the City of Kenosha, passed a resolution setting age 65 as the compulsory retirement age for 62.13 Plan participants.

Age 65 remained the uniform mandatory retirement age for protectives until May 7, 1974 at which time the Council, over the objections of the older firefighters, bowed to pressure from the younger firefighters and the union and passed Ordinance 39-74 which lowered the compulsory retirement age for WRF protectives from 65 to 60. The purpose of this change was to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally hold the higher ranking positions. However, the actions taken did not effectuate this purpose. The uncontroverted evidence presented to the Trial Court clearly demonstrated that it

was the §62.13 firefighters who held the higher ranking positions in the Kenosha Fire Department. Furthermore, the undisputed evidence disclosed that during the first five years of the operation (May 7, 1974 - May 7, 1979), the mandatory retirement age of 60 compelled the retirement of only two (2) WRF firefighters, the Petitioners Mr. Desris and Mr. Konrad, whose removal as an Apparatus Operator and Lieutenant could have created a maximum of seven (7) promotions. On the other hand, the application of the same retirement age to members of the §62.13 Plan could have created 102 promotions.

The passage of this ordinance created a disparity between the retirement ages for the WRF and 62.13 Plan protectives. In an attempt to rectify this disparity, James Gerlach, one of the three firefighters on the KFPB, introduced a resolution at the May 21, 1974 meeting of that body to reduce the mandatory retirement age for 62.13 Plan participants to 60 in order to maintain a consistent retirement age for all Kenosha firefighters. This resolution was defeated by a four (4) to three (3) vote with the three firefighters (Gerlach, Inele and Robinson) voting for it and the four city officials (Burkee - Mayor; Blasi - Fire Chief; Rudy - City Comptroller; and Procarione - City Clerk) voting against it.

As a result of this action, the Respondent City maintained two separate compulsory retirement ages for its firefighters—age 60 for those covered by the WRF but age 65 for those covered by the 62.13 Plan. On February 1, 1980, almost six (6) years later, the retirement age for 62.13 protectives was to become age 60 pursuant to Ordinance No. 107-78, passed on December 18, 1978, but this retirement age was never implemented since the Respondent City has rescinded all mandatory retirement ages under both the WRF and 62.13 Plans until December 31, 1980 pursuant to Ordinance No. 2-80 and later to December 31, 1981 pursuant to Ordinance No. 84-80.

On January 1, 1977 Petitioners John F. Desris and Leo F. Konrad were mandatorily retired at the ages of 61 and 60, having obtained 25½ years of service, from their respective positions as Apparatus Operator and Lieutenant due solely to Ordinance No. 39-74. Since that time no other firefighter under either the WRF or the 62.13 Plan has been compulsorily retired at age 60 despite the fact that several have reached and surpassed that age.

Petitioners brought this action in the United States District Court for the Eastern District of Wisconsin under 28 U.S.C. §1343(3) and (4) in order to secure relief under 42 U.S.C. §1983 and 29 U.S.C. §621 *et seq.*, and the due process and equal protection clauses of the fourteenth amendment.

The parties entered into a Partial Stipulation of facts and submitted motions for summary judgment, upon which the trial court rendered a decision in favor of the petitioners, in which it was held that the equal protection clause of the fourteenth amendment had been violated by the establishment of different retirement ages for the two groups of firefighters. On September 9, 1982, the Seventh Circuit Court of Appeals reversed. Petitioners' Petition for Rehearing and Rehearing En Banc was denied on January 26, 1983.

ISSUES

I. THE SEVENTH CIRCUIT COURT OF APPEALS VIOLATED RULE 52(a) IN REVERSING THE TRIAL COURT'S DECISION.

A. WHETHER TWO GROUPS ARE SIMILARLY SITUATED FOR EQUAL PROTECTION ANALYSIS IS A QUESTION OF ULTIMATE FACT FOR THE TRIAL COURT, AND THE SEVENTH CIRCUIT VIOLATED RULE 52 IN REVERSING THE TRIAL COURT'S FINDING ON THIS ISSUE.

In its decision, the Seventh Circuit held that the two groups of firefighters are not similarly situated. The Panel engaged in what amounted to a *de novo* review of the facts, which resulted in the substitution of its view of the facts, both ultimate and subsidiary, for the careful findings of fact by the trial court. In fact, the Panel even supported part of its decision with its own finding of fact that was directly in conflict with a stipulation of the parties.

In its opinion, the trial court found that the firefighters covered by the Wisconsin Retirement Fund (hereinafter "WRF") do not comprise a separate and distinct department apart from the firefighters under the §62.13 Plan; that the WRF firefighters are not subject to a different chain of command than the §62.13 firefighters; that the pension plans do not determine the difference in job duties or responsibilities; and that other than the pensions, salaries, benefits and other indicia of City employment are not determined by the plan by which the firefighters are covered. These findings may be characterized as findings of subsidiary facts. The trial court summed up its review of these facts by finding that there is no substantial difference between the WRF firefighters and the 62.13 firefighters. This can be characterized as an ultimate fact:

> There is nothing in the records or in the arguments of the parties to suggest that there is a substantial difference between the WRF firefighters and the 62.13 firefighters that would cause these concerns to be more appropriate with respect to one group than the other.

In reversing and holding that the two groups are not similarly situated, the Seventh Circuit ignored the mandate of *Pullman-Standard v. Swint*, ___ U.S. ___, 102 S.Ct. 1781 (1982), in which this Court held that findings of ultimate fact are not to be reversed unless clearly erroneous. In *Pullman-Standard*, this Court made it crystal clear that Rule 52(a) of the Federal Rules of Civil Procedure applies to findings of ultimate fact as well as to findings of subsidiary facts:

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

___ U.S. at ___, 102 S.Ct. at 1789.

Although the Seventh Circuit did not specifically admit that it made such a *de novo* review of the trial court's findings of fact on the justification that such *de novo* review is permissible when the lower decision was rendered upon a motion for summary judgment, it obviously did so. In fact, it would simply be following its decision in *Silverstein v. United States*, 419 F.2d 999 (7th Cir. 1969), *cert. den.*, 397 U.S. 1041 (1970), that in a disposition of an action upon a motion for summary judgment, the "clearly erroneous" rule does not apply, since only questions of law are presented.

After this Court's decision in *Pullman-Standard*, there is no question that the exception set forth in *Silverstein* is

no longer good law. Although it is not expressly stated in the majority opinion in *Pullman-Standard*, the evidence presented at the trial court level with regard to the relevant issue which was decided by the Court (whether there was intent to discriminate in the creation of a seniority system), was closely analogous to the documentary evidence presented to the trial court in this action. Justice Marshall stated in his dissent in *Pullman-Standard* that the trial court's findings of fact were "entirely based on documentary evidence." ___ U.S. at ___, 102 S.Ct. at 1796. Therefore, it is implicit in the majority opinion of *Pullman-Standard* that Rule 52(a) does not carve out exceptions to the "clearly erroneous" rule even in "paper cases." Nevertheless, that is precisely what the Seventh Circuit did in the instant case when it substituted its view of the facts for that of the trial court.

A closer examination of this issue reveals that several of the circuit courts of appeals, in addition to the Seventh Circuit, have also held that the standard of appellate review is different for "paper cases." In *Lamb v. Interstate Commerce Commission*, 259 F.2d 358, 360 (10th Cir. 1958), the Tenth Circuit held that it was "in as good a position as the trial judge to evaluate the stipulated facts." In *San Flippo v. United Brotherhood of Carpenters*, 525 F.2d 508 (2d Cir. 1975), the Second Circuit held that it was also in as good a position as the trial court to read and interpret the pleadings and affidavits upon which a decision had been rendered. *Accord, Hadco Products, Inc. v. Walter Kidde and Co.*, 462 F.2d 1265 (3d Cir. 1972), *cert. den.*, 409 U.S. 1023 (1972). It was further stated in *Emmco Insurance Co. v. Wallenius Caribbean Line, S.A.*, 492 F. 2d 508 (5th Cir. 1974) that the trial court's findings, when based upon documentary evidence, are deprived of a degree of finality which would otherwise attach under Rule 52(a).

On the other hand, the Eighth Circuit has not followed this incorrect line of reasoning. In *Worthen Bank and Trust Company v. Franklin Life Insurance Company*, 370 F.2d 97

(8th Cir. 1966) the Eighth Circuit flatly rejected the application of a different standard of appellate review to decisions upon motions for summary judgment. The reasoning of the Eighth Circuit in *Cole v. Neaf*, 334 F.2d 326, 329 (8th Cir. 1964) clearly presaged the implications inherent in *Pullman-Standard*.

> We have repeatedly and consistently held, at least subsequent to the Supreme Court's decision in *Commissioner of Internal Revenue v. Duberstein*, 363 U.S. 278, 291, 80 S.Ct. 190, 4 L.Ed.2d 1218, that the clearly erroneous standard applies to reasonable inferences to be drawn from stipulated or undisputed facts and that it is for the trial court rather than this court to draw legitimate and permissible inferences.

The Ninth Circuit has also rejected the position adopted herein by the Seventh Circuit. In *Quon v. Niagara Fire Insurance Co.*, 190 F.2d 257, 260 (9th Cir. 1951), the Ninth Circuit held that the findings of fact by the trial court with regard to stipulations are not subject to more probing appellate review than in other types of cases.

This egregiously improper exercise of appellate review on the part of the Seventh Circuit, which is concurred in by several other courts of appeals, is in direct conflict with *Pullman-Standard v. Swint and Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, ____ U.S. ____, ____, 102 S.Ct. 2182, 2189 (1982), wherein this Court again emphasized that the determination of the weight of the evidence is "the special province of the trier of fact." In its decision, the Seventh Circuit ignored the well-established principle that the function of an appellate court is "not to decide factual issues *de novo* . . . ." *Tenth Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 123 (1969). As this Court recently cautioned in *Inwood Laboratories, supra*,

> *An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another*

> *construction resolve the ambiguities differently, and find a more sinister cast to action which the District Court apparently deemed innocent." United States v. Real Estate Boards*, 339 U.S. 485, 495, 70 S.Ct. 711, 717, 94 L.Ed. 1007(1950).

____ U.S. at ____, 102 S.Ct. at 2190.

What is presented here is an improper usurpation by the Seventh Circuit of the function of the trial court to find subsidiary and ultimate facts. This exercise of appellate review, although sanctioned by various courts of appeals, is in direct conflict with the holdings of the Court.

B. THE SEVENTH CIRCUIT VIOLATED RULE 52 WHEN IT MADE A FINDING OF FACT CONTRARY TO THE STIPULATION OF THE PARTIES IN ORDER TO FIND A RATIONAL BASIS.

An even more incredible example of the Seventh Circuit's eagerness to substitute its view of the facts for that of the trial judge is the Panel's finding of fact that is in direct contradiction to the stipulations entered into between the parties. In its opinion, the Seventh Circuit stated that the Common Council had exercised its authority to extend the WRF retirement age for WRF firefighters from age 55 to age 60. This is absolutely incorrect. Stipulation 13 (agreed to by the parties) clearly states that the retirement age had already been established by the Common Council at 65, and that on May 7, 1974, it voted to reduce the retirement age from age 65 to 60:

> 13. Prior to passage of Ordinance No. 19-56, passed on July 2, 1956, *WRF* protective occupation employees retired at the age of sixty-five (65) pursuant to 66.906(1), Wisconsin Statutes. Ordinance No. 19-56 adopted this mandatory retirement age for all city employees. In 1967 the Wisconsin Legislature, through Chapter 355 Laws of 1967, amended Section 66.901, Wisconsin Statues to provide that after January 30, 1974 the

> normal and conditional retirement age for each protective occupation participant would be fifty-five (55) unless the municipality or local government had exercised its authority to extend the retirement age beyond fifty-five (55) pursuant to Wisconsin Statutes Section 41.11(1) or its predecessor Wisconsin Statutes Section 66.906(b). Ordinance No. 39-74, passed May 7, 1974, *reduced* said mandatory retirement age for *WRF* protective occupation employees to sixty (60). *Said reduction* in the age for mandatory retirement was done as a result of lobbying by union officials and the younger employees affected by the retirement age seeking a *reduced* retirement age. The older employees, however, opposed this *reduction* in the retirement age. One of the purposes of said change was to provide greater promotional opportunities for firefighters by creating a greater turnover in older personnel who generally hold the higher ranking positions. Ordinance No. 107-78, passed December 19, 1978, placed a moratorium on mandatory retirement at age sixty (60) until February 1, 1980. (emphasis supplied)

The significance of this egregious violation of Rule 52 is that the erroneous finding of fact involved, *i.e.*, that the retirement age was increased from 55 to 60, is absolutely necessary to the court's reasoning that there *was* a rational basis for the discrimination.

The Panel also held that there was a rational basis in that the stated purpose of the WRF was "to provide for the payment of annuities and other benefits to employees . . . ." The Panel stated that this purpose, when coupled with the fact that the §62.13 pension plan provides potentially smaller retirement benefits than the WRF plan, provides a reasonable basis for requiring the WRF firefighters to retire earlier than the §62.13 firefighters, because the §62.13 firefighters could thereby more easily provide adequate financial support for themselves and their families.

Petitioners submit that such a rational basis is illusory and is dispelled when the proper constitutional standard is applied. Governmental action complies with the strictures of equal protection only when "it rationally *furthers* a legitimate state purpose." *Zobel v. Williams*, ___ U.S. ___, 72 L.Ed.2d 672, 678 (1982) (emphasis supplied), see also *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976). When this test is applied it becomes evident that the City's actions in *reducing* the mandatory retirement age cannot pass constitutional scrutiny because they do not *further* any legitimate state interest.

The Petitioners do not here dispute that the WRF's stated purpose of providing for the payment of annuities and other benefits to its employees is a legitimate purpose. The pivotal issue herein, however, is not whether that purpose is legitimate but whether the City of Kenosha's action in *reducing* the retirement age for its WRF firefighters *furthered* that purpose. Clearly, it did not. While lowering the WRF retirement age did not prohibit the Petitioners from receiving any benefits at all, it did result in those benefits being lower than they would have been had the Petitioners been permitted to retire at age 65. This would have occurred because the WRF calculates benefits on the basis of a percentage of final average pay and this percentage increases with the number of years of service culminating at 80% after approximately 35 years of service. Since the Petitioners were compelled to retire after only 26 years of service, their pension benefits were correspondingly lower than they would have been had they retired at age 65.

Nor did allowing §62.13 firefighters to continue working until age 65 further the purpose articulated by the Seventh Circuit of enabling the §62.13 firefighters to provide adequate financial support for themselves and their dependent families. Unlike the WRF Plan, the benefits of which are calculated on a graduated scale determined by years of service, benefits under the §62.13 Plan are fixed

and inalterable once a firefighter initially qualifies for benefits, regardless of the number of years of service. The §62.13 Plan provides that a firefighter governed by its provisions is entitled to a pension of 50% of his base pay plus the value of his fringe benefits once he reaches age 55 and has 22 years of service. Regardless of how much longer he might serve, unlike the WRF Plan, this formula does not change.

In the final analysis, the critical issue is whether *reducing* the WRF mandatory retirement age from 65 to 60 *rationally furthered* any legitimate state purpose. Clearly it did not *further* the purpose of providing annuities to WRF firefighters. Equally clear is that it did not *further* the provision of adequate financial support for §62.13 firefighters.

C. DE NOVO FACTUAL REVIEW DISCOURAGES CONSERVATION OF JUDICIAL RESOURCES.

Furthermore, such *de novo* appellate review thwarts the very purposes behind Rule 52(a): the efficient adjudication of controversies. In recent years, there has been an increasing concern over the backlog of cases clogging our federal courts. The number of district and circuit judges has been increased substantially in an attempt to stem this ever increasing flood of litigation. In an attempt to conserve our overtaxed judicial resources, arbitration has been suggested, every attempt is made to facilitate settlement, and even magistrates are being impressed to decide issues formerly reserved to district judges. The district courts are pursuing every means to reduce the time spent in trial through close supervision during the pre-trial stages of litigation.

Certainly in light of such an overburdened judiciary, the parties should be encouraged to avoid trials whenever it is possible through the use of stipulations and documentary

evidence, as the parties did in this action. Not only was a trial avoided, but a jury trial at that. Yet, there is little incentive indeed to pursue such alternatives to trial when a prevailing party must face the specter of a *de novo* factual review by the appellate courts.

If such a double standard is to apply, a party will be much better served to demand not only a trial, but a jury trial whenever possible, since an appellate court is necessarily more constrained in so blatantly substituting its judgment for that of the trial court where a trial has been held. Petitioners suggest that such a development is hardly in the best interest of a judicial system already taxed to the limit by an overly litigious society.

This Court should grant this petition and accept this opportunity to clearly define the proper limits of appellate review. Without such clarification by this Court, litigants will be well-advised to insist upon full jury trials upon all issues, with their narrow scope of appellate review, rather than to avail themselves of the efficient means of disposition of issues such as summary judgment, at the risk of being subjected to *de novo* review by the appellate court.

II. THE SEVENTH CIRCUIT ERRED IN HOLDING THAT WHETHER TWO GROUPS ARE SIMILARLY SITUATED IS A THRESHOLD QUESTION THAT WHEN RESOLVED IN THE NEGATIVE OBVIATES THE NEED TO DETERMINE IF THERE IS A RATIONAL BASIS FOR DIFFERENT TREATMENT.

The seventh Circuit premised its opinion upon the initial determination that the two groups of firefighters are not similarly situated, without viewing the issue in the context of the constitutional analysis of which it is a part. The Panel treated the issues of "similarly situated" and "rational basis" as two separate, segregable issues. This improper division of a single constitutional test allowed the Seventh Circuit to review the facts *de novo* and to

substitute its view for that of the trial court, and thus barely avoid the more difficult, but proper question, which is whether the few actual differences between the two groups merits different retirement ages under the equal protection clause of the fourteenth amendment.

After making this difficult leap in logical reasoning, the Seventh Circuit then stated that if it *were* necessary to decide whether a rational basis existed for the disparity in retirement ages, such rational basis did exist, and went on to enumerate the reasons for this rational basis.

This segmented analysis is improper, and is not sanctioned in the Court's decisions. Certainly the issue of whether two groups which are treated differently are similarly situated is a valid question. Nevertheless, it is meaningless unless considered along with all of the surrounding circumstances. It is insufficient to state that two groups are not similarly situated and thereby justify dissimilar treatment. It is imperative that it be shown that the dissimilarity itself creates a rational basis for the distinction between the two groups. Otherwise, it would always be possible to latch upon some kind of dissimilarity, and thereby avoid the more difficult consideration of whether there was any rational basis for the different treatment.

The implications of the Seventh Circuit's holding are disturbing. If courts could avoid whether there was a rational basis for discrimination between two groups by simply finding they were not similarly situated, then the concept of equal protection would be reduced to an empty shell without meaning, since there will always be *some* difference between two groups sufficient to say they are not similar.

Certainly, no one disputes that blacks are not similarly situated to whites in our society. Because of the very denial of the equal protection of the law, blacks have suffered

lesser educational, employment, and other opportunities, all making for marked socioeconomic differences between blacks and whites.

Under the equal protection analysis used by the Seventh Circuit, a court would never get to the issue of whether there was a compelling state interest supporting racial classification, because the equal protection inquiry would cease with a finding that the two groups were not similarly situated.

Perhaps an even better analogy is to gender-based classifications. Again, few would deny that there are significant differences between men and women, socioeconomic and cultural differences, as well as the more obvious physical ones. Yet, this Court has made it clear that such differences do not automatically justify differences in treatment as would the Seventh Circuit's novel analytical approach. It must still be shown that the particular nature of the dissimilarity, in this case gender, itself forms a rational basis for treating the two groups differently.

The Court made this principle clear in *Reed v. Reed*, 404 U.S. 71 (1971), wherein it was held that an Idaho statute, which provided that as between persons equally qualified to administer estates, males must be preferred, violated the fourteenth amendment:

> In applying that clause, this Court has consistently recognized that the Fourteenth Amendment does not deny to states the power to treat different classes of persons in different ways . . . . The Equal Protection Clause of that amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. (citations omitted)

Id. at 75-76.

A vital portion of this analysis under the equal protection clause of the fourteenth amendment is whether the classification is valid because it has a "fair and substantial relation to the object of the legislation." *Id.* at 76. *Accord, Kahn v. Shevin*, 416 U.S. 351 (1974). In *Tigner v. Texas*, 310 U.S. 141 (1940), this Court certainly did analyze the differences between the two groups afforded different treatment, but did so in conjunction with an analysis of whether these differences were substantial enough to merit different treatment. Hence, the issue of whether the groups are "similarly situated" is not a threshold question which must be decided before reaching the issue of whether there is a rational basis for the difference in treatment. Rather, it is just one possible rational basis for differing treatment provided one can show that the dissimilarity is itself rationally related to the legitimate purpose in question.

Not only was the Seventh Circuit's analysis flawed, but so was its justification for holding that the two groups of firefighters are not similarly situated. The Panel held that the two groups of firefighters are not similarly situated because one group is covered by the §62.13 pension plan, and the other is covered by the WRF. The Panel did, however, admit that the date of *hire* is the sole factor that determines to which of the two pension plans a Kenosha firefighter belongs (except for a choice which was given the §62.13 firefighters when the WRF was established). The Panel based its finding that the two groups are not similarly situated upon three factors:

(1) "The §62.13 plan afforded pensioners the opportunity to select members of the KFPB, and who in turn determined the §62.13 retirement age." This is a distinction without a difference. Under *Owen v. City of Independence*, 455 U.S. 622 (1980), both the KFPB and the Common Council, which chose the WRF retirement age, are agents of the City; both may subject the City to liability for their violations of the law. Further, it was stipulated that the mayor, who voted as a member of the KFPB to keeep

the §62.13 retirement age at 65, failed to exercise his veto power over the ordinance passed by the Common Council to reduce the retirement age for WRF firefighters from 65 to 60. In actuality, the City was directly responsible for the establishment of different retirement ages for its firefighters. This is precisely the type of "interactive behavior" that *Owen* addresses.

(2) "The WRF has potentially greater benefits than the §62.13 plan." Again, this is no indication of a real and substantial difference between the two groups of firefighters. Furthermore, while the WRF Plan may have the potential for greater benefits in the abstract, the effect of the City's decision was to cause the Petitioners' pension benefits to be lower than those provided by the §62.13 Plan. Even more importantly, allowing §62.13 firefighters to continue working until age 65 had no relationship to the pension benefits they would receive since the formula by which their benefits are calculated was fixed and inalterable regardless of whether they retired at 60 or 65. In short, the difference cited by the Panel has no meaning or substance in the context of this case.

(3) "The WRF Plan contains a mandatory retirement age of 60, while the §62.13 members may wait until age 65 to retire." This is a purely boot-strap argument in view of the fact that this lawsuit is *based* upon this discrepancy in retirement age. Under no set of circumstances should the very harm that has been done to the Petitioners be used as a *basis* for the justification of that harm. This argument proves nothing. Further, the retirement ages for the two groups are entirely separate and apart from the pension plans. The retirement ages were both statutorily left up to the discretion of and established by agents of the City.

The Panel also stated in its opinion that the various provisions of each plan cannot be viewed in isolation. Surely this cannot be true; the retirement age is entirely *separable* from the administrative procedure for each plan. Neither

plan required that a particular retirement age be established for the firefighters covered by its terms. Each plan left the establishment of the retirement age up to the discretion of the City. Therefore, the issue of the proper retirement age for firefighters was a separate policy question for the City to decide. And the City in fact did so, through its agents. The State of Wisconsin made the determination as to how pension benefits should be accrued and awarded, but left the mandatory retirement age as a separate issue for the City to decide. In its decision, the Panel surely knew that how one looks at the question predetermines the result: if one only finds that there are two separate pension plans with separate retirement ages, benefits, and procedures, and inquires no further, the outcome is, of course, the same as that reached in the Panel's decision.

But if one looks farther, and views the issue in the proper perspective, the result is also clear: the City of Kenosha, Wisconsin, treats its firefighters unequally by forcing one group to retire at age 60 and another group to retire at age 65. The only basis for this distinction is the entirely fortuitous and unimportant factor of when the firefighters were hired. Other than being covered by a different pension plan, Petitioners are no different in their circumstances than the §62.13 firefighters: they all work in the same department of the City; they perform essentially the same job duties; they possess the same qualifications; they are subject to the same rules and regulations and chain of command; and they are met with the same promotional opportunities as the §62.13 firefighters. The *only* difference between the two groups is in the pension plans, and, as the trial court found, this difference is not great enough to find that the two groups are not similarly situated for purposes of the equal protection clause.

It is undeniable that distinctions beween groups of people must be based on *real* and *substantial* differences. *Zobel v. Williams*, ____ U.S. ____, 72 L.Ed.2d 672 (1982);

Sneed v. Shaffer Oil and Refining Co., 35 F.2d 21 (8th Cir. 1929); *Wisconsin v. Johnson*, 246 N.W.2d 503 (Wis. 1976).

The extremely improper formulation and implementation of the "rational basis test" under the equal protection clause of the fourteenth amendment by the Seventh Circuit in its decision below merits this Court's inquiry.

III. THE SEVENTH CIRCUIT SOUGHT TO AVOID THE APPLICATION OF THIS COURT'S DECISION IN *OWEN V. CITY OF INDEPENDENCE*, 455 U.S. 622 (1980) BY APPLYING AN IMPERMISSIBLE STANDARD OF APPELLATE REVIEW AND BY UTILIZING AN ERRONEOUS FRAGMENTATION OF THE RATIONAL BASIS TEST.

It is apparent that by improperly broadening its standard of appellate review, and by creating a threshold question of "similarly situated" in equal protection "rational basis" analysis, the Seventh Circuit sought to avoid the consequences of this Court's decision in *Owen v. City of Independence*, 455 U.S. 622 (1980). The Seventh Circuit stated that it was unnecessary to reach the issue of whether the action taken by the §62.13 Plan's administering board, the KFPB, could be characterized as official City action. That this tortured reasoning is a blatant attempt to circumvent this Court's holding in *Owen v. City of Independence* is apparent from a reading of the Seventh Circuit's opinion:

> Implied in the district court's opinion is the conclusion that the plaintiffs and §62.13 pension plan firefighters are similarly situated as to the requirement of mandatory retirement because they are all firefighters employed by City of Kenosha. This oversimplified analysis of the circumstances presented in this case ignores the fact that the procedures for setting a date for mandatory retirement are part of two separate and distinct programs with separate and distinct benefits, which differ from each other in at least three important respects.

687 F.2d at 1119.

Although the Seventh Circuit technically based its decision upon its finding that the firefighters are not "similarly situated," the net effect of the decision is a circumvention of the intent and spirit of *Owen*.

In *Monell v. New York City Department of Social Services*, 436 U.S. 658 (1978), this Court overruled prior decisions and held that local governing entities may be liable under 42 U.S.C. §1983 for "monetary, declaratory, or injunctive relief where, as here the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." *Id.* at 690. That decision recognized that a municipality can only act through its agents. *Owen v. City of Independence, supra* carried *Monell* even farther and stands for the principle that a municipality is not entitled to use the good faith of its officers and agents as a qualified immunity from liability for their official acts under §1983. In reaching its decision, the Court cited with approval the "Thayer principle:"

> [I]f it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done.

Id. at 641.

This Court found no good reason to extend such a qualified immunity to municipalities in view of the

standards of acceptable state action mandated by the United States Constitution:

> [A] municipality has no "discretion" to violate the Federal Constitution; its dictates are absolute and imperative. And when a court passes judgment on the municipality's conduct in a §1983 action, it does not seek to second-guess the "reasonableness" of the city's decision nor to interfere with the local government's resolution of competing policy considerations. Rather, it looks only to whether the municipality has conformed to the requirements of the Federal Constitution and Statutes.

Id. at 649.

Indeed, the rationale for the Court's holding in *Owen* was clearly explained as being one of encouragement to the safeguarding of citizens' constitutional rights:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights. Furthermore, the threat that damages might be levied against the city may encourage those in a policy-making position to institute internal rules and programs designed to minimize the likelihood of unintentional infringements on constitutional rights. *Such procedures are particularly beneficial in preventing those "systemic" injuries that result not so much from the conduct of any single individual, but from the interactive behavior of several government officials, each of whom may be acting in good faith.*

Id. at 651-52 (emphasis supplied).

It is undeniable that the difference in treatment accorded the Petitioners is the very sort of "systemic"

injury mentioned in the above quoted passage. Nevertheless, the Seventh Circuit stated that it was unnecessary to even reach the issue of whether the action taken by the §62.13 Plan's administering board, the KFPB could be characterized as official city action, because it held that the two groups of firefighters are not similarly situated. This attempt to circumvent and avoid the application of *Owen* to the facts of this case warrants this Court's granting of this Petition for Writ of Certiorari.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted and the judgment of the Court of Appeals for the Seventh Circuit should be reversed.

Respectfully submitted,

J. BRUCE CROSS
(Counsel of Record)

STEPHEN W. JONES
KATHRYN D. HOLT
HOUSE, JEWELL, DILLON,
DOVER & DIXON, P.A.
1550 Tower Building
Little Rock, Arkansas 72201
(501) 375-9151

Counsel for Petitioners